UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

EL PASO ELECTRIC COMPANY

and

Cases 28–CA–21111
28–CA–21217
28–CA–21309

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 960, AFL-CIO

*Mara-Louise Anzalone, Esq.*, for the General Counsel.
*Daniel C. Dargene* and *Jarrett R. Andrews, Esqs.,* for the Respondent.
*Mr. Felipe Salazar, Jr.*, for the Charging Party.

DECISION

Statement of the Case

GEORGE CARSON II, Administrative Law Judge. This case was tried in El Paso, Texas, on July 31 and August 1, 2007, pursuant to a consolidated complaint that issued on May 31, 2007.[1] The complaint alleges two threats in violation of Section 8(a)(1) of the National Labor Relations Act, several unilateral changes to the terms and conditions of employment of unit employees in violation of Section 8(a)(1) and (5) of the Act and, pursuant to certain alleged changes, the warning of two employees and the discharge of one employee in violation of Section 8(a)(1) and (5) of the Act, as well as two instances of direct dealing in violation of Section 8(a)(1) and (5) of the Act.[2] The Respondent's answer denies any violation of the Act and affirmatively pleads a Section 10(b) defense. I find that the Respondent has established that defense with regard to certain allegations. I find that the Respondent violated the Act by engaging in direct dealing with employees and making one unilateral change.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

[1] All dates are in 2006 unless otherwise indicated. The charge in Case No. 28–CA–21111 was filed on December 5. The charge in Case No. 28–CA–21217 was filed on January 30, 2007. The charge in Case No. 28–CA–21309 was filed on April 5, 2007.
[2] The General Counsel, at the hearing, withdrew subparagraph 7(g) which alleged the transfer of bargaining unit work at the Company's Anthony, New Mexico, warehouse. Counsel's post hearing brief withdraws subparagraph 7(f) which alleged the reassignment of the Scottsdale Operating Crew to new reporting locations and alteration of their job duties.

## Findings of Fact

### I. Jurisdiction

The Respondent, El Paso Electric Company, a Texas corporation, is engaged in the generation, transmission, and distribution of electricity in the States of Texas and New Mexico. The Company annually derives gross revenues in excess of $250,000 and annually purchases and receives goods and products valued in excess of $50,000 directly from points outside the State of Texas. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that International Brotherhood of Electrical Workers, Local Union 960, AFL-CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

### II. Alleged Unfair Labor Practices

#### *A. Introduction*

The parties' collective bargaining history dates from 1944. Their prior collective-bargaining agreement expired on June 15, 2006. Shortly before the commencement of the hearing herein, the parties agreed upon the terms of a successor agreement. The current unit includes employee classifications that voted for union representation in 2003 and 2004. Unfair labor practices arising from the Respondent's opposition to the organizational effort of the Union with regard to Customer Service Representatives (CSRs) were found by the Board in *El Paso Electric Co.*, 350 NLRB No. 14 (2007). The Respondent's initial opposition to inclusion in the historical bargaining unit of the employees who chose to be represented by the Union in 2003 and 2004 resulted in unfair labor practice findings by Administrative Law Judge John McCarrick in *El Paso Electric Co.*, JD(SF)–03–07 which is currently pending before the Board. Only one allegation herein relates to either of the foregoing decisions.

The employees of the Company perform various tasks associated with an electrical utility including the installation and maintenance of transmission lines, meter reading, and billing and collections. The parties stipulated that the following unit, hereinafter referred to as the Unit and in which all of the represented employees are included, is an appropriate unit:

> **Including:** The employees of El Paso Electric Company working in the following classifications in the **Power Supply Operating Departments:** Janitors, Apprentice Operator, Operator, Inside Operator, Senior Operator, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Power Supply Division Maintenance Department**: Insulator, Helper, Helper/Apprentice, Apprentice Mechanic, Apprentice Electrician, Apprentice Laboratory Technician, Apprentice Instrumentation Technician, Mechanic, Electrician, Laboratory Technician, Instrumentation Technician, Electronic Specialist, Predictive Maintenance Technician, Working Supervisor, Vibration Specialist, Level II, Vibration Specialist, Level III, and Working Supervisor-Vibration Specialist; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division, Distribution Construction, Distribution Operations, Transmission Design and Maintenance**: Helper, Helper/Apprentice, Apprentice Lineman, Apprentice Cable Splicer, Apprentice Equipment Operator, Lineman, Cable Splicer, Equipment Operator, and Working Supervisor; the employees of El Paso

Electric Company working in the following classifications in the **Transmission and Distribution Division Meter Testing/Service**: Helper, Helper/Apprentice, Apprentice Meter Technician, Meter Technician, Meter Laboratory Specialist, Service Worker, Inspector-Wiring and Meter Service Order Worker, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division Substation and Relay Department**: Helper, Helper/Apprentice, Apprentice Electrician, Apprentice Equipment Operator, Apprentice Relay Technician, Equipment Operator, Electrician, Relay Technician, Relay Specialist, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Transmission and Distribution Division Communications Department**: Helper, Helper/Apprentice, Apprentice Communication Technician, Communication Technician, and Working Supervisor; the employees of El Paso Electric Company working in the following classifications in the **Administrative Division Garage Section**: Janitor, Helper, Tool and Material Handler, Senior Tool and Material Handler, Apprentice Mechanic, Mechanic, Technician, and Working Supervisor; the following employees of El Paso Electric Company working in the following classifications in the **Treasury Services Warehouse Section:** Fuel Handler, Warehouse Helper, Tool and Material Handler, Senior Tool and Material Handler, Material Handler, Senior Material Handler, Material Truck Operator, Working Supervisor, and Working Supervisor-Power Supply; and **Miscellaneous**: Laborer (Temporary), and Laborer (After 1 Year) employees; all full-time and regular part-time Meter Readers, and Collectors, Technician-Sr. Electrical/Technician-Sr. HVAC/Technician-Jr. Electrical/Technician-Sr. Maintenance/Technician-Maintenance/Clerk-Facilities Services VI; and all full-time and regular part-time Customer Service Representatives I, II, II and Customer Service-Clerk-Telephone Center employees employed by the El Paso Electric Company at the telephone center at 100 N. Stanton, El Paso, Texas, and the outlying offices including Chelmont, Fabens and Van Horn, Texas, and Anthony, Hatch, and Las Cruces, New Mexico.

**Excluding:** All other employees, office clerical employees, dispatchers, professional employees, guards and supervisors as defined in the Act.

With the exception of the events of September 13, the complaint allegations relate to discrete incidents. For clarity and consistency, I shall address the four allegations arising from the September 13 events and, thereafter, separately address the remaining complaint allegations, incorporating when necessary any prior finding.

*B. The Events of September 13 (Complaint Subparagraphs 6(a), 7(b), (k), and (l))*

1. Facts

These allegations arise from events at the Company's Las Cruces, New Mexico, facility, referred to as the Las Cruces yard, on September 13. On that day, a severe storm, with at least one tornado actually touching down, crossed the Las Cruces area. Some electrical construction crews began responding to calls of outages. Other crews, upon direction from their supervisors, returned to the Las Cruces yard before 4 p.m. The shift ended at 4 p.m.

The expired collective-bargaining agreement, Article V, Section 3 A, provided that "[p]rearranged overtime is defined as overtime to be worked when an employee is notified during the employee's regularly scheduled hours." Prearranged overtime is paid at time and one half. Article V, Section 2 A and B provides that during emergencies employees are required

to fulfill the Company's obligation to maintain and restore service to its customers and that they shall be paid double time if "called out," i.e. called in to work after their shift.

The crews who returned to the yard went to the lunchroom. Shop Steward Edward Trujillo estimated that there were a total of at least 10 employees present, but the record does not establish the number of crews included in that number. Trujillo recalls that Construction Crew Supervisor Jack Diehl told the crews, "We need all you guys to stay." The time that this direction was given is unclear; however, it was before 4 p.m. Trujillo objected because Diehl made it "a global thing where everybody has to stay, standby." Diehl acknowledges that he informed Shop Steward Trujillo that he intended to "have them [the crews] stand by," and that Trujillo immediately objected, stating that "there was no standby in the contract and that they did not have to do that."

Construction Manager Art Garcia, who has responsibilities both in El Paso and at Las Cruces, was in El Paso when the storm struck. He came to the Las Cruces facility and, upon arrival, asked Shop Steward Trujillo to speak with him. They met in a vacant office.

Trujillo recalls that Garcia opened the conversation by stating, "What's this that you guys don't want to standby." Trujillo responded that, if the Company wanted the employees to work, "put us to work but don't just hold me here." He then referred to the negotiations for the prior collective-bargaining agreement, in which the parties had agreed to a beeper system so that employees could be called in, noting that the Company had "wanted the beepers and that's what those are for. You guys got the people to cover this kind of stuff." Trujillo testified that Garcia responded, "You guys are going to have to stay. … If not, you're going to force me to use disciplinary action." Trujillo stated that he did not want any unit employee to get in trouble, and claims that he asked how many employees the Company actually needed, and upon being told four, that he obtained four volunteers. As discussed below, I do not credit that testimony.

Garcia recalls that he asked Trujillo, "What's going on here?" Trujillo responded that the employees did not have to stay that "there's no standby." Garcia acknowledged that he was aware that the term standby did not appear in the collective-bargaining agreement stating, "I realize that we don't have a standby in the clause," but "our job is … to get service back to our customers." Garcia then asked, "[W]hy are you guys declining to stay?" Trujillo repeated, "[W]e don't have standby." Garcia pointed out that this had occurred before, that "[w]e've asked for volunteers and we've had -- people -– during a storm … here in El Paso and Las Cruces." Trujillo asked why the Company could not "let us go home and then you can page us out?" Garcia responded that he hoped that Trujillo was "not misleading these guys and telling them not to work … because it's insubordination. I'm going to instruct the supervisors to go out there and appoint and I hope that you let them really make the right decision." Supervisor Diehl appointed four employees to work.

Employee Donald "Woody" Grubbs was one of the employees appointed by Supervisor Diehl. He recalls that "it was 4:00 and we were walking out the door and I was approached by Jack Diehl and he told me, I'm appointing you to stay and work." Grubbs replied that he could not, "I need to go home." Trujillo intervened, telling Diehl that he ought to let Grubbs go to address a problem at his home, when, contemporaneously, employee Loring White volunteered to stay. All four of the employees appointed by Diehl were appointed shortly after 4 p.m., and all of them were paid double time.

When asked whether, "[p]rior to that day," he had asked employees to standby under similar circumstances," Diehl answered, "Yes." He denied previously receiving any objection from the Union "with respect to those requests," and Trujillo did not dispute that testimony.

Although Trujillo denied that he was familiar with the term "standby," documentary evidence in the form of overtime slips confirm that employees had worked overtime on "storm standby," "standby" and "storm watch."

Employee Woody Grubbs acknowledged having been dispatched due to a storm while in the field and "if you were already working you would usually stay." When asked whether he was "ever asked to stay after your shift to stand by and see if the storm required emergency work," Grubbs answered, "No." Asked whether that ever changed, Grubbs related the occasion noted above when Diehl appointed him to stay and employee White volunteered to stay for him.

Diehl testified that he had previously asked employees to standby under similar circumstances, but he was not asked whether he had ever directed employees to standby. The record suggests that, in the past, the Company had sought and obtained volunteers in these circumstances. Garcia was told, on September 13, that no employees were volunteering. The absence of volunteers, according to the uncontradicted testimony of employee Grubbs, resulted from individual decisions, not any action by the Union.

2. Analysis and Concluding Findings

The foregoing facts are the predicate for four complaint allegations. Subparagraph 6(a) alleges that Construction Manager Garcia threatened employees with unspecified reprisals if they did not comply with the Respondent's changed work rules, policies, and practices regarding standby duty. Subparagraph 7(b) alleges that the Respondent promulgated and implemented changes to its work rules, policies, and practices regarding standby duty. Subparagraph 7(l) alleges that Garcia "bypassed and dealt directly with its employees in the Unit by soliciting employees to agree to perform work in a manner not provided for in the parties' expired collective-bargaining agreement or consist with … past practice." Subparagraph 7(k) alleges that the Respondent denied employees double time for performing work outside their normal shifts and required several named employees to work standby duty.

I shall address the foregoing allegations in reverse order. Garcia and Trujillo agree that the term "standby" does not appear in the contract, but the overtime slips in evidence establish that employees were familiar with the term. The absence of that term in the contract is meaningless because the expired contract provides for prearranged overtime at time and one half and call in pay at double time. The Respondent had the right to require that employees work outside of their normal hours. The only question was when work was assigned and, therefore, at what rate it was going to be paid. The General Counsel's brief does not address the uncontraverted evidence that, following the conversation between Trujillo and Garcia, the employees appointed after the shift ended were not told to "standby;" they were, according to Grubbs, appointed "to stay and work." Because they were appointed after the shift ended at 4 p.m., all were paid double time. I shall recommend that subparagraph 7(k) be dismissed.

There is no evidence that Garcia bypassed the Union. The General Counsel's argument that Garcia dealt with Head Shop Steward Trujillo as an individual ignores the evidence that this was a pay dispute predicated upon the absence of the word "standby" in the contract. In dealing with Steward Trujillo, Garcia neither bypassed the Union nor otherwise dealt directly with any employees. I shall recommend that subparagraph 7(l) be dismissed.

There was no unilateral change. The crews in the lunchroom did not volunteer to stay. The brief of the General Counsel does not address the provisions of the expired collective-bargaining agreement that gave the Respondent the right to assign overtime during regular

working hours. The Respondent had the right to assign prearranged overtime. In the absence of volunteers, Diehl told the employees, "We need all you guys to stay." Shop Steward Trujillo protested. This was, quite simply, a pay dispute. Confirmation that the Union's protest was predicated upon pay is confirmed by Garcia's credible testimony that Trujillo asked why the Company could not "let us go home and then you can page us out?" Even if Diehl's direction that all of the crews stay be viewed as an announcement of a unilateral change, it was never implemented. The Respondent did not, after giving the "global" direction to standby, pay the employees at time and one half. The employees left at 4 p.m. while Shop Steward Trujillo was protesting to Construction Manager Garcia, who directed that individual employees be appointed to work. Thus, even if the "global thing" was unprecedented, the Respondent did not act upon it but made specific job assignments and, because those assignments were made after 4 p.m., the employees were paid double time. I shall recommend that the allegation of a unilateral change be dismissed.

Employee Grubbs' testimony contradicts the testimony of Trujillo that Trujillo obtained four volunteers. I credit Garcia that Trujillo asked why the Company could not let the employees go home and then "page us out," thereby entitling them to double time. I further credit Garcia that he hoped that Trujillo was not misleading the employees, because a refusal to work would constitute insubordination. Contrary to the complaint allegation, there was no threat of unspecified reprisals if employees did not comply with changed work rules relating to standby duty. Shop Steward Trujillo was informed that the failure of employees to work upon receiving an overtime assignment would be considered insubordination. Assignment of overtime was consistent with past practice and was specifically set out in the expired collective-bargaining agreement. I shall recommend that this allegation be dismissed.

*C. Alleged Threat (Complaint Subparagraph 6b))*

The complaint alleges that Chief Executive Officer Gary Hedrick threatened employees with loss of employment through subcontracting out their work because they had engaged in union or other protected activities.

On the evening of October 24, representatives of the Company and Union were engaged in contract negotiations. A number of employees, as they had done on previous occasions, gathered in a public "triangle of space" in front of the Plaza Theater and across from the Centre Building, in which the negotiations were occurring, to show support for the negotiating team of the Union. On this particular evening, CEO Hedrick and his wife had decided to dine at a restaurant that was located adjacent to the area in which the supportive demonstration was occurring. Upon hearing the employees chant his name, Hedrick requested his wife to enter the restaurant and obtain their table. He crossed the street and spoke with the employees. As hereinafter discussed, he spoke with several employees. The conversation relevant to this allegation occurred between Hedrick and employee Linda Montes.

The Union's negotiating committee, which included Business Agent Felipe Salazar, President David Barraza, and employee Linda Montes, leaned of Hedrick's presence, took a recess from negotiations, and went outside. Montes approached Hedrick and referred to the Hewitt Study, a study that related to fair compensation and to which the Company had referred during the organizational campaign among the Customer Service Representatives (CSRs) in 2004. As set out in the decision of Judge McCarrick, JD(SF)–03–07, slip op. at 50, one of the initial proposals by the Company in the collective-bargaining agreement being negotiated gave the Company the right to subcontract the jobs of the CSRs. After referring to the Hewitt Study, Montes asked, "[W]hat had changed, that now because of negotiations they want to subcontract us out. They want to get rid of us so that they can hire a contractor at $7.00 an

hour." Hedrick replied, "Linda, you're getting over paid. I'm not limited to just your position. … I'll get rid of any and all positions so that the board of directors and myself can earn more money."

Employee Rosanne Enriquez, at some point, overheard Hedrick state that that "if he could save 15% by subcontracting out work, he would subcontract out work to save 15% of a department's budget."

Hedrick did not recall the name of CSR Montes. He did recall speaking with employee Enriquez after she was named at the hearing. He acknowledged also speaking with other employees. He denied discussing the wage rate of CSRs or stating that he would "get rid of any and all jobs so the board of directors can make more money." He acknowledges that he "may have pointed out … that there was a call center here in El Paso that was taking calls for several utilities from out of town and so that it [subcontracting] was a, you know, kind of a wave of the future." He denied stating that he would subcontract if it would save the company money because "there are lots of other issues that have to do with quality of service," and that he did not "think I would have … made just that naked statement … in general, the discussions have not been solely about dollars in terms of the subcontracting issue." I do not credit Hedrick.

Montes had a specific question related to what she perceived as an inconsistency between the Company's representations during the organizational campaign and its bargaining position relating to subcontracting. I credit her clear recollection of Hedrick's response. The remark overheard by employee Enriquez regarding saving "15% of a department's budget" is consistent with Hedrick's reference to the "any and all positions" to which Montes testified. Hedrick's comments relating to cost savings by subcontracting were not directed to or limited to CSRs. The callous answer of Hedrick, that Montes was being overpaid and that he would "get rid of any and all positions" so that the board of directors and he could receive more compensation, was stated in economic terms relating to "all positions." It was not stated in terms of the CSRs having selected the Union as their collective bargaining representative. Although reflecting executive greed rather than concern for employees, Hedrick's remarks did not "threaten loss of employment through subcontracting … because … [the employees] engaged in Union … activities." I shall recommend that this allegation be dismissed.

*D. Alleged Unilateral Changes (Complaint Subparagraphs 7(a) and (c)-(f).*

1. Subparagraph 7(a)

Subparagraph 7(a) of the complaint alleges that "[i]n or about July … the Respondent promulgated and implemented changes to its work rules, policies, and practices regarding employees' lunch breaks and use of the Respondent's vehicles."

Although the record does not establish the exact date, sometime after Hector Puente assumed the position Vice President of Transmission and Distribution, he directed all of his subordinate managers to inform the employees whom they supervised that they would no longer be permitted to drive company vehicles in order to transport themselves to local restaurants or pick up food to be consumed at the location at which they were working. It is undisputed that there was no notice to or bargaining with the Union regarding this change in employee working conditions. Insofar as employees were disciplined for violating that unilaterally imposed rule, it constituted a significant change in working conditions. The change occurred prior to June 5, more than six months before the filing of the first charge herein on December 5. Section 10(b) of the Act and Board precedent preclude finding a violation if the Union was on notice of the change more than six months prior to the filing of the charge.

The Union was on notice insofar as it related to meter readers in El Paso. Supervisor Manny Prado announced the prohibition to the meter readers in early May and meter reader and Shop Steward David Aguilera filed a grievance over the change on May 18.

The probative evidence also establishes that the Union was on notice of the change insofar as it related to employees working in the Las Cruces yard. Although employees Woody Grubbs and Huey Miles placed the announcement of the change in the latter part of 2006, their testimony was not specific, and I do not credit it. Employee Alfredo "Fred" Gardea, an employee in the Service Department, attended a meeting of employees in February at which Supervisor Danny Sanchez announced that employees could not take company vehicles to lunch. He recalls that Head Shop Steward Edward Trujillo was present at that meeting. When John Day, the newly appointed Service Department supervisor, announced the prohibition about taking vehicles to lunch as well as other rules on June 2, Gardea was already aware of the prohibition because of the February meeting at which Sanchez had announced it. Trujillo did not address this allegation in his testimony, and he did not deny that he was present at the meeting in February at which Sanchez announced the prohibition.

The Respondent's answer pleads Section 10(b) and its brief argues that this allegation is barred by 10(b). The brief of the General Counsel does not address the 10(b) issue or the evidence that Shop Steward Aguilera filed a grievance regarding the change on May 18 and that Head Shop Steward Trujillo was present when the prohibition was announced by Sanchez at Las Cruces. The Respondent has established its affirmative defense with regard to the promulgation of the rule prohibiting the use of company vehicles to travel to restaurants for lunch or to pick up food. I shall recommend that this allegation be dismissed.

2. Subparagraph 7(c)

The brief of the General Counsel does not address this allegation of repromulgation of the foregoing rule in October. The only evidence of repromulgation is a document titled Working Line Orders issued by Las Cruces Service Department Supervisor John Day in either July or August stating that employees are not to "stop at RESTAURANTS to eat in or drive through to pick up food." The initial promulgation of the rule was outside of the Section 10(b) period, and the rule does not impinge upon Section 7 rights. The repromulgation changed nothing. I shall recommend that this allegation be dismissed.

3. Subparagraph 7(d)

This allegation relates to four alleged changes in work rules affecting the Service Department at Las Cruces regarding (1) a time deadline for leaving the yard, (2) employee communications with customers, (3) the manner in which work on line orders was performed and reported, and (4) employees' ability to swap work assignments.

Prior to June 2, Jack Diehl was supervisor of the seven employees in the Service Department, plus two to five employees who rotated into and out of that department as needed, a total of from nine to twelve employees. Although Diehl had certain expectations, he did not formalize them into directives. Rather, he handled matters on a case by case basis. Thus, if it came to his attention that an employee had too much nonproductive time, Diehl would counsel the employee regarding reducing "yard time," i.e. time in the yard rather than in the field, or spending too much time talking with customers. This is reflected upon the coaching worksheet of employee Fred Gardea who was counseled regarding reducing "yard time" on June 18, 2004, and again on June 27, 2005. Gardea admitted that Diehl also spoke with him regarding conversations with customers.

On June 2, when John Day became supervisor of the Service Department, Diehl introduced him, and Day spoke with the employees regarding his expectations. He went over a list of bullet points on a computer generated document that he had created. Consistent with that list, Day informed the employees that he expected them to leave the yard within 15 minutes following the morning meeting in which assignments were given. He reannounced the prohibition of taking company vehicles to restaurants. With regard to work assignments, he requested that all swapping of assignments be done before the employees left the yard so that the dispatch clerk was aware of any changes.

In a separate meeting on June 23, Day cautioned employees regarding spending too much time talking to customers.

In July or August, he could not state a specific date, Day issued a document titled Working Line Orders setting out "the duties you are expected to perform when working line orders." The document restates the expectations noted above and added additional expectations including "notify Supervisor of the status of the work" when an employee was not able to complete an assignment and "not drive around town to burn up time."

Day gave no notice to the Union or any shop steward with regard to the subjects he addressed in June or in the Working Line Orders. There is no evidence that the Union was on notice of these changes that related only to employees in the Service Department under Day's supervision for more than six months prior to the filing of the charge, and the Respondent does not argue that these allegations are barred by Section 10(b). Nevertheless, in order to establish a violation of the Act, the General Counsel must establish that the expectations that Day communicated did, in fact, constitute "material, substantial, and significant" changes. Fred Gardea, who has worked in the Service Department for over 24 years, was the only Service Department employee to testify. Thus, in making the following findings, I am relying upon the testimony of former supervisor Diehl, current supervisor Day, and Gardea.

Regarding having to leave the yard within 15 minutes of being released, Gardea explained that employees, after being released from the daily meeting in which work assignments were distributed, would check the truck, load stuff, get ice, and use the restroom. The foregoing preparations for leaving for the day "would take 20, 25 minutes … [and] [i]t's kind of hard to do it in 15 minutes." Dielh's morning meetings generally lasted no more than 10 minutes, and he expected employees to have left the yard by 8 a.m., leaving them with 20 minutes of preparation time. Thus, this change effectively shortened the preparation time of employees by five minutes. I view the employees' preparation time as a term and condition of employment analogous to cleanup time. Before changing such a working condition, an employer is obligated to give notice to and bargain with the Union. See *Concord Docu-Prep, Inc.*, 207 NLRB 981, 987 (1973). By unilaterally requiring Service Department employees to leave the yard within 15 minutes, the Respondent violated Section 8(a)(1) and (5) of the Act.

The allegation relating to communications with customers is more complicated. On June 23, Day reminded the employees "to limit their time with and talking to customers." Gardea testified that Day told the employees that he did not "want us to talk to customers," and that he protested. Day acknowledged that, when he addressed this issue, one employee protested and that he explained that "socializing was what I meant to call it." That clarification is reflected in the Working Line Orders document which directs employees "not to stop and visit with customers." As the General Counsel's brief points out, Diehl, when he was supervisor, "wanted my employees to be cordial and friendly." Not cited in the brief is Diehl's testimony that work had to be done, other customers needed their orders completed, and that he did speak

with employees about "spending too much time visiting with customers." Gardea confirmed that Diehl, when he was supervisor, spoke to him about having conversations with customers "just to kind of remind me." The evidence fails to establish any substantive change with regard to conversations with customers. I shall recommend that this allegation be dismissed.

Prior to Day becoming supervisor, employees had not been required to call in to advise that they were going to be unable to finish a job. Diehl had no such requirement. He "would usually ask them" if he needed to know. Although the daily computer records would reveal whether the work was completed, personal notification that a job had not been finished would obviously be useful to Day in determining assignments for the following day. Gardea, although confirming that the call in requirement was a change, did not testify to any inconvenience caused by the requirement. In short, this was not a "material, substantial, and significant" change that would trigger a bargaining obligation. *Berkshire Nursing Home*, 345 NLRB No. 14 (2005). I shall recommend that this allegation be dismissed.

The final change alleged in the complaint relates to swapping work assignments. Diehl explained that the dispatcher had to be notified in order to move a job assignment from "one truck to another truck." When Diehl was supervisor "they had to go through me to do the swaps." Day required that employees do any swaps "prior to leaving the facility because it makes no sense to go back in the building … and everything associated with it." Gardea did not address this allegation. There is no evidence that Day's expectation that all swaps be made before leaving the facility had any significant impact upon the working condition of employees. There is no evidence that Day ever refused a request to swap an assignment made from the field. The absence of testimony by Gardea regarding this allegation confirms the absence of any impact. This was not a "material, substantial, and significant" change. I shall recommend that this allegation be dismissed.

Although not set out as a specific allegation, the General Counsel's brief addresses Gardea's testimony concerning the direction in the Working Line Orders document that employees "not drive around town to burn up time." The brief cites the testimony of Gardea that, in the past, Diehl "didn't want us in the yard" prior to 4 p.m., and that sometimes employees would just drive around. The General Counsel does not cite the testimony of Gardea that the prohibition has had no impact because "Las Cruces is getting bigger and … you don't really have time to do that." Insofar as this evidence arguably relates to the allegation regarding the manner in which work is performed and reported, I find, consistent with the testimony of Gardea, that the prohibition has had no impact because employees no longer "have time to do that," and therefore it does not constitute a "material, substantial, and significant" change. I shall recommend that this allegation be dismissed.

4. Subparagraph 7(e)

Subparagraph 7(e) alleges the February 2007 promulgation of a rule regarding the retention of disciplinary letters in employee personnel files.

The General Counsel's brief does not address this allegation. The only evidence proffered in support of this allegation was the testimony of Jesus Manuel Marrufo who had his driving privileges suspended for 14 months in 1995 or 1996. At the time of the suspension, Marrufo recalls that Tony Guel, his supervisor at the time, told him that his "driving privileges were suspended because I had three incidents in three years." The foregoing statement, following his third accident, establishes only that statement of fact by his former supervisor. If he had had the three chargeable accidents in a two year period, his supervisor might well have informed him that his privileges were suspended because he had three accidents in two years.

In October, Marrufo was involved in an accident. Soon thereafter, Marrufo met with his current supervisor, Refugio Chavez, and a representative from the safety department. He was informed that the accident had been determined to be a chargeable accident and that "it was going to be on my driving record for five years." Marrufo questioned the five year period asking "what happened to the three years that they had before." Chavez replied that five years "was the policy now," that it "was going to stay in my file for five years and that if I got two more within the five years" that his driving privileges would be suspended. The statement of Chavez that five years "was the policy now" does not specify whether he was referring to document retention or chargeable accident calculation.

Marrufo recalls seeing no document either in the 1990's or in October. Marrufo was unaware of whether there was a "difference between the Company policy as to how long it keeps those documents in your personnel file and how long it holds those incidents against you, as a part of your driving record." Numerous warnings to various employees in 2005 and 2006 state that the disciplinary warning "will remain in your employee file for five years."

The complaint allegation is that "[i]n or about February, 2007, … the Respondent promulgated a rule regarding the retention of disciplinary letters in employees' personnel files." Documentary evidence establishes that for at least two years the Respondent had been informing employees that the document reflecting discipline would be retained for five years. Marrufo's testimony that he was told that "this was going to stay in my file for five years and that if I got two more [chargeable accidents] within the five years" his driving privileges would be suspended may arguably establish a change regarding the period over which chargeable accidents were calculated, but that is not the complaint allegation. There is no evidence that disciplinary letters were kept for less than five years in 1995 or 1995. There is no complaint allegation of a change in the relevant period regarding suspension of driving privileges. The evidence before me does not establish any change relating to the retention of disciplinary letters. I shall recommend that this allegation be dismissed.

*E. Alleged Adverse Employment Actions (Complaint Subparagraphs 7(j) and (o))*

1. Subparagraph 7(j)

Complaint subparagraph 7(j) alleges that the Respondent issued written warnings to employees David Aguilera and Paul Lopez pursuant to its unilaterally imposed rule regarding lunch breaks and use of the Respondent's vehicles. As discussed above, Shop Steward Aguilera filed a grievance on May 18 shortly after the change was announced.

It is undisputed that Aguilera and Lopez violated the unilaterally imposed rule on June 22 when they took a company truck to a restaurant and had the misfortune to encounter Vice President Puente. Both received an oral reprimand and a notation in their subsequent annual evaluations reflecting that they had received discipline. Thus, although not written warnings as alleged in the complaint, the oral reprimands constituted discipline of which a record was made.

The new rule, although unilaterally imposed, was imposed outside the Section 10(b) period, and it does not impinge upon Section 7 rights. The brief of the Respondent does not address the issue of discipline. The cases cited in the brief of the General Counsel are inapposite. In *Randolph Children's Home*, 309 NLRB 341 (1992), Administrative Law Judge Raymond Green specifically rejected the respondent's Section 10(b) defense and found that the rule in question was not unambiguously communicated to employees until January 30, 1991, within the Section 10(b) period. Id. at 344. Unlike the situation in *Rahco, Inc.*, 265 NLRB 235

(1982), the oral warnings administered to Aguilera and Lopez did not constitute a newly instituted and formalized disciplinary policy. The unilaterally imposed rule herein does not impinge upon employee Section 7 rights; thus, its maintenance and enforcement does not constitute a separate violation of the Act. See *Eagle-Picher Industries*, 331 NLRB 169, 174 (2000). Directly on point is the Board decision in *Wald Mfg. Co.*, 176 NLRB 839, 841 (1969), in which no violation was found with regard to the nondiscriminatory enforcement of work rules that had been unilaterally promulgated prior to the Section 10(b) period. I shall recommend that this allegation be dismissed.

2. Subparagraph 7(o)

The complaint alleges that the Respondent discharged employee Carlos Robles pursuant to changed rules regarding the combining of breaks found to have been promulgated unilaterally in *El Paso Electric Company*, JD(SF) 03-07, decided by Judge McCarrick. That case is currently pending before the Board; however, it is not relevant to my finding herein.

In December, the date is not specified, the company truck to which meter reader Robles was assigned was "spotted on the Wal-Mart parking lot on Mesa Street" between 1:15 p.m. and 1:30 p.m., a distance of more than 15 miles from his assigned work area. Supervisor of Meter Reading and Collections Gregory Gonzales received a call from another supervisor asking whether one of the company trucks, unit 3006, should have been in that area. The truck was assigned to Robles who was on the east side of town, not the west side where the Wal-Mart was located. Gonzales checked the output from Robles' handheld computer upon which meter readings were recorded and noted that there was a "12, 13 minute gap, early on in the route," which may or may not have been a morning break, and then a final reading at 12:44 p.m.

Gonzales met with Robles who denied having taken the vehicle to Wal-Mart. Notwithstanding the denial, given the identification of the vehicle in the parking lot between 1:15 and 1:30 p.m., coupled with the fact that Robles took no meter readings after 12:44 p.m., and that Robles was the only employee assigned to that vehicle, Gonzales determined that he had done so. The Company Employee Handbook, at page 16, provides that company property should be used for business purposes only. The Meter Reading Manual, page 9, states that company vehicles are provided to meter readers for their "daily transportation to and from their routes." Insofar as an employee leaves his route and takes a company vehicle to an unassigned destination on personal business, the foregoing policies are violated.

On or about February 14, Gonzales met with Robles, his shop steward, and Angie Arreola from Human Resources and "presented the document indicating that he had violated the leaving the area policy again and this had already been the second incident regarding this … and advised him, because of this continued action, that he was being separated from the company on that day." The document to which Gonzales referred was not identified or offered into evidence. Employee Carlos Robles was not presented as a witness and did not testify, thus the testimony of Gonzales regarding what he stated to Robles is uncontradicted.

The unilateral change alleged in the complaint, as found in *El Paso Electric Company*, JD(SF) 03-07, related to prohibiting employees from combining their morning, afternoon, and lunch breaks. The General Counsel argues that the "Respondent has simply tried to repackage this discharge as something other than what ALJ McCarrick found to be a straight-out violation of the Act," referring to the unilaterally imposed rule prohibiting combining breaks.

Supervisor Gonzales admitted that, in addition to leaving his work area, Robles did also violate the break rules. The General Counsel argues that leaving his work area "was inexorably

tied to this fact," and that the record is "devoid of any written evidence that the reason for Robles' discharge was 'leaving the work area.'" Although no "written evidence" was offered, there is no testimonial evidence that Robles was discharged for any reason other than that to which Supervisor Gonzales testified. His uncontradicted testimony is that he met with Robles, his shop steward, and Arreola from Human Resources, "presented the document indicating that he had violated the leaving the area policy again and this had already been the second incident regarding this," and that he then "advised him, because of this continued action, that he was being separated from the company on that day." Insofar as neither Robles nor his shop steward testified, I have no basis for finding that Gonzales stated anything other than the words to which he testified or for concluding that Robles was discharged for any reason other than, as he was told by Gonzales, for violating "the leaving area policy again."

Violation of the unilaterally imposed prohibition regarding combining breaks was not the basis for the discharge of Robles. His use of a company vehicle for other than transportation to and from his route permitted him to be identified miles from his assigned work area, and he had been disciplined previously for leaving his assigned area. In the absence of any testimonial evidence disputing the foregoing, I cannot conclude that Robles was discharged for any reason other than other than leaving his work area, which is what he was told by Gonzales. The General Counsel has not established that Robles was terminated pursuant to a unilaterally promulgated rule. I shall recommend that this allegation be dismissed.

*F. Allegations of Bypassing the Union (Complaint Subparagraphs 7(m) and (n)*

Subparagraph 7(m) alleges that the Respondent, by CEO Gary Hedrick, bypassed the Union and dealt directly with employees, and subparagraph 7(n) alleges that, based upon that direct dealing, the Respondent "implemented proposals … thereby undermining the Union's status as the exclusive collective bargaining representative of the Unit."

As already discussed, on the evening of October 24, a group of unit employees gathered in a public area across from the Centre Building in order to demonstrate support for the negotiating team of the Union. CEO Hedrick and his wife had come to dine at a restaurant across from where the supportive demonstration was occurring. Upon hearing the employees chant his name, Hedrick requested his wife to enter the restaurant and obtain their table. He crossed the street and spoke with the employees.

Meter and Laboratory Specialist Roseanne Enriquez testified that Hedrick walked into the group, and "put his hands in the air, palms down, and motioned for us to be quiet, at which time we fell quiet." He then stated that "he was there to find out what our concerns were, to find out what it is we wanted." Hedrick testified, "I think I said something in the nature of, you know, do you want to chant or do you want to talk?" I credit the clear and credible of testimony of Enriquez over what Hedrick thinks he said "something in the nature of."

When no one immediately answered, Enriquez spoke to Hedrick about the "driving policy," a proposal relating to driving privileges that the Company was insisting be in the contract. Enriquez told Hedrick that the proposal was "too ambiguous," and he answered that his understanding was that it was a matter of "insurability and –- being able to certify drivers." The conversation continued, and Hedrick told Enriquez that "he'd check into it." Enriquez, although obviously not on the Union negotiating committee which was meeting at that very time, told Hedrick that "if he would get that driving policy changed, he'd get a signed contract."

The negotiating committee of the Union learned of Hedrick's presence and, after he had been speaking with employees for about 15 minutes, came out of the Centre Building into the

group. Hedrick did not recall speaking specifically with any of them, but, as discussed above, committee member Linda Montes spoke with him. In addition to the driving policy, Hedrick acknowledged speaking with an employee who had been severely injured and about subcontracting. After speaking with various employees for over half an hour, Hedrick left. As he was leaving he told Enriquez that he would "check into that driving policy."

Enriquez did not receive a call from Hedrick. On Friday, October 27, she called him and asked whether he had looked into the driving policy proposal. Hedrick, who did not recall this call, told Enriquez that he had looked into it, that "as he thought, that it was insurability and certifiability but that he, also, agreed that the wording was too ambiguous." He told Enriquez that he had "told them," presumably the negotiating team of the Company, "to tighten up the language and resubmit it."

Paul Garcia, spokesperson for the Company during the negotiations, acknowledged that he and some members of the negotiating committee met with Hedrick on the day following those conversations, because "we wanted to talk to him what was going on. He basically just told us this was what transpired." Garcia denied being directed to take any action relative to negotiations as a result of Hedrick's conversations. Despite that denial, Garcia admitted that at the next negotiating session, on November 6, the company provided a "proposal on … the driving policy." On November 7, the Respondent's public relations department, by e-mail, gave employees an update on negotiations stating that the Company had continued "to preserve the substance of its prior proposal, except for a concession on its Driving proposal, where the Company removed the wage adjustment for medical conditions."

As Counsel for the General Counsel correctly argues, citing *Outdoor Venture Corp.*, 336 NLRB 1006, 1011 (2001), "where a high-ranking company official 'visits' with employees on a picket line and engages them in discussion on 'a wide range of matters which were also subjects of discussion in contract negotiations,' such conduct undermines the employees' collective-bargaining representative and constitutes unlawful direct dealing."

The Respondent, citing *Georgia Power Co.*, 342 NLRB 192 (2004), argues that an "employer may lawfully consult with its own employees in formulating proposals for bargaining." Id. at 193. In that case, the employer assured the union that the consultation was limited to the crew leader selection process and informed the committee with which it consulted that "they were not to negotiate or to even get into the subject matter of negotiations." Ibid. In *Permanente Medical Group*, 332 NLRB 1143 (2000), cited as precedent by the Board in *Georgia Power Co*., the consultation related to "the design phase of a program" that would "yield only a proposal to be presented to the union for bargaining." Ibid. In this case the proposals were already on the table. Hedrick was not seeking to formulate proposals.

Hedrick dealt directly with employees rather than their bargaining agent. After telling the employees that "he was there to find out" what their concerns were, "what it is we wanted," he spoke with the employees about various proposals that were the subject of negotiations. "The Respondent 'may not seek to determine for himself the degree of support or lack thereof,' which exists for a position that it seeks to advance in negotiations with the employee bargaining representative." *Harris-Teeter Super Markets*, 310 NLRB 216, 217 (1993), citing *Obie Pacific*, 196 NLRB 458, 459 (1972). The obligation of the employer is to deal with the employees' collective bargaining representative and not seek "to inform itself by direct dealings with employees how certain of its bargaining proposals sit with the employees, as opposed to their agent at the bargaining table." *Northwest Pipe & Casing Co.*, 300 NLRB 726, 733 (1990). Any argument that Hedrick was not seeking to determine how the proposals sat with the employees is belied by his assurance to Enriquez that he would "check into that driving policy" and his

informing her that he had told "them" to "tighten up the language and resubmit it."

Subparagraph 7(n) alleges as a separate violation the presentation of a proposal based upon Hedrick's direct dealing. Board precedent holds that it is of "no consequence that the Respondent did not change its position" after hearing from the employees. *Harris-Teeter Super Markets*, supra at 217. 310 NLRB 216, 217 (1993). As a matter of logic, the obverse, that a change of position is of no consequence, would preclude the finding of a violation, and the General Counsel cites no case in which a violation was found based upon alteration of a bargaining proposal as a result of direct dealing. The vice is the direct dealing. The presentation of what the Respondent's own document characterizes as a concession following Hedrick's direct dealing simply underscores the significance of the encounter and the sound rationale established by precedent that direct dealing undermines the status of the collective bargaining representative. I shall, therefore, recommend that subparagraph 7(n) be dismissed. The Respondent, by engaging in direct dealing with unit employees as alleged in subparagraph 7(m) of the complaint, violated Section 8(a)(1) and (5) of the Act.

## Conclusions of Law

1. By bypassing the Union and dealing directly with employees regarding proposals being negotiated by their collective bargaining representative, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

2. By unilaterally, without notice to or bargaining with the Union, reducing the preparation time allowed to unit employees in the Service Department at Las Cruces, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

## Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist, take certain affirmative action, and post an appropriate notice. The General Counsel, both in the complaint and in the brief, seeks special remedies including a broad order, publication of the notice in both English and Spanish, and the reading of the notice. I concur that publication of the notice in both English and Spanish is appropriate. The violations found herein do not support the imposition of additional special remedies.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

## ORDER

The Respondent, El Paso Electric Company, El Paso, Texas, its officers, agents, successors, and assigns, shall

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Refusing to bargain with International Brotherhood of Electrical Workers, Local Union 960, AFL-CIO, the exclusive collective bargaining representative of the employees in the Unit, by directly dealing with employees regarding proposals being negotiated by the Union.

(b) Unilaterally, without notice to or bargaining with the Union, reducing the preparation time allowed to unit employees in the Service Department at Las Cruces,

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unilateral change made in the terms and condition of employment of the unit employees in the Service Department at Las Cruces, New Mexico, by restoring the practice of permitting them 20 minutes preparation time before leaving the facility.

(b) Within 14 days after service by the Region, post at its facilities in El Paso, Texas, and Las Cruces, New Mexico, in both English and Spanish, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 2, 2006.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 21, 2007

George Carson II
Administrative Law Judge

[4] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain with the International Brotherhood of Electrical Workers, Local Union 960, AFL-CIO, the exclusive collective bargaining representative of the employees in the Unit, by directly dealing with you regarding proposals being negotiated by your Union.

WE WILL NOT unilaterally, without notice to or bargaining with the Union, reduce the preparation time allowed to unit employees in the Service Department at Las Cruces, New Mexico, and
WE WILL rescind the unilateral change made in their terms and condition of employment by restoring the practice of permitting them 20 minutes preparation time before leaving the facility

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of your rights guaranteed by Section 7 of the Act.

EL PASO ELECTRIC COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue,-Suite 1800, Phoenix, AZ 85004-3099
(602) 640–2160, Hours: 8:15 a.m. to 4:45 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640–2146